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Supreme Court of the United States

OCTOBER TERM 1967

No. 1308

CORLISS LAMONT, on behalf of himself and all others similarly situated,

Petitioner,

against

COMMISSIONER OF MOTOR VEHICLES and R. L. POLK & Co.,

Respondents.

BRIEF FOR RESPONDENT COMMISSIONER OF MOTOR VEHICLES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the District Court (App. p. 18 of Pet.) is reported at 269 F. Supp. 880. The opinion of the Court of Appeals for the Second Circuit is unreported as yet (App. p. 17 of petition).

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Does the sale by the Commissioner of Motor Vehicles to another of the list of New York motor vehicle registrants, a list containing neither intimate nor vital facts concerning the individual motor registrant and undeniably a public record within the meaning of New York Public Officers Law § 66, violate the right of privacy of petitioner, a New York motor vehicle registrant?

Statute Involved

This case involves the alleged unconstitutionality of § 202(3) of the New York Vehicle and Traffic Law.

Statement

Petitioner's complaint alleges that he is a New York resident and owner of a motor vehicle registered pursuant to the provisions of the New York Vehicle and Traffic Law § 401. He commenced this action below on behalf of himself and allegedly all other owners of motor vehicles registered in New York* seeking both a declaratory judgment declaring New York Vehicle and Traffic Law § 202(3) unconstitutional and the convening of a three judge court.

In particular, petitioner alleges that the respondent R. L. Polk & Co. is a Delaware corporation doing business in New York and is engaged *inter alia* in the business of compiling and publishing directories and reference books. In accordance with Vehicle and Traffic Law § 202(3) respondent Commissioner of Motor Vehicles has sold and delivered the 1967 list of names of registered owners of motor

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* It is clear that one who attacks the constitutionality of the statute can only do so insofar as it affects himself and not others even though of the same general class. *Tileston* v. *Ullman*, 318 U. S. 442 (1943); *Voeller* v. *Neilston Warehouse Co.*, 311 U. S. 531 (1941).

vehicles to respondent Polk & Co., the highest responsible bidder therefor, and petitioner alleges that the Commissioner will continue to sell this list to that company unless ordered to cease and desist.

Section 202(3) of the New York Vehicle and Traffic Law provides that the Commissioner of Motor Vehicles:

> "may, in his discretion, contract with the highest responsible bidder to furnish copies of records of all vehicle registrations for any registration period, or number of periods not exceeding five years in the aggregate, with respect to a given territory. In such event, the fees provided by this section [for searching and supplying copies of such records] shall not apply to copies of records furnished under any such contract."

Petitioner alleges that Polk & Co. in turn uses the names so purchased from the Commissioner to solicit "through the mails by telephone and in person of the registered owners of vehicles, for the purchase of merchandise" and that such solicitation has resulted in "considerable annoyance . . . . by reason of the large volume of advertising and crank mail" in derogation of his rights of privacy.

Reasons for Denying the Writ

Petitioner has wholly failed to raise a substantial constitutional question.

(1)

Petitioner below sought the convening of a three-judge court to declare New York Vehicle and Traffic Law § 202 subd. 3 unconstitutional as a violation of his right to privacy.

It has been often stated by this Court that "the three-judge procedure is an extraordinary one, imposing a heavy burden on federal courts, with attendant expense and delay.

That procedure designed for a specific class of cases, sharply defined, shall not be lightly extended". *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386, 391 (1934).

The history of the unique feature in our federal jurisprudence was recently set forth in *Swift & Co. et al.* v. *Wickham*, 382 U. S. 111, 116-124 (1965). This Court there reaffirmed the axiomatic proposition that the three-judge court enactment is not to be viewed "as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term are to be applied as such". *Phillips* v. *United States*, 312 U. S. 246, 251 (1941).

Upon an application for the convening of a statutory three-judge court, the power of the single district judge is limited to threshold inquiries of (a) whether the constitutional question raised is a substantial one and (b) whether the complaint sets forth a basis for invoking the traditional equity jurisdiction of the federal courts.* *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713, 715 (1962).

It is apparent from the complaint in this action that the petitioner has not presented any basis for convening a three-judge court.

The formula to be applied in determining whether or not a substantial federal question has been presented is set forth in *California Water Service Co. et al.* v. *City of Redding*, 304 U. S. 252 (1938):

> "The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the

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* Since, as we demonstrate below, that respondent's claim is so clearly insubstantial, we deem it unnecessary to explore this aspect of respondent's complaint.

previous decision of . . . [the Supreme] Court as to foreclose the subject." *Id.* at 255.

The Courts below, unquestionably applying that formula, properly determined that the petitioner's assertions were wholly without merit and accordingly presented no substantial federal question requiring the convening of a statutory Court.

(2)

In 1890, an article appeared in the Harvard Law Review which, overnight, added a new dimension to the law, a "right of privacy". See Warren & Brandeis, *The Right of Privacy,* 4 Harv. L. Rev. 193 (1890) . Since publication of that article the legal commentators have catalogued the existence of four separate actionable groups of torts which would violate one's right to privacy.

Professor Prosser and other legal commentators have classified those four groups of cases as follows: (1) public disclosure of private information about a plaintiff's life; (2) intrusion upon plaintiff's physical solitude or seclusion; (3) publicity which places the plaintiff in a false light in the public eye and (4) appropriation of the plaintiff's name or likeness.*

The petitioner, in this action, has cast his two-pronged attack upon the constitutionality of New York Vehicle & Traffic Law § 202(3) and the alleged use of the information received by Polk & Co. in terms of a violation of his right to privacy.

Although petitioner, naively or otherwise, seeks to spread the broad mantle of invasion of privacy over both these

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* Prosser on Torts § 112 (3d edition 1964); see also Feinberg, *Recent Developments in the Law of Privacy,* 48 Col. L. Rev. 713 (1948); see generally, annot, 138 A.L.R. 22 (1942) supplemented in Annot, 14 A.L.R. 2d 750 (1950).

allegations, each prong of the attack is governed by distinct and separate considerations.

Clearly, petitioner's attack upon the constitutionality of Vehicle & Traffic Law § 202(3) which provides for the sale of certain information to the highest bidder is properly catalogued under the group of cases under the law of privacy described above as public disclosure of details of one's private life; the petitioner's attack upon the use by Polk & Co. of this information, allegedly resulting in a deluge of noxious mail upon his mailbox, bears consideration of the law of privacy as it relates to an intrusion upon one's solitude or seclusion.

An examination of these two contentions substantiates the finding by the District Court and the Court of Appeals of insubstantiality.

(a)

Right to Privacy: Publicity Given to an Individual's Private Life.

Since, as just noted, the petitioner chose to predicate his challenge to New York's Vehicle & Traffic Law § 202(3) on his asserted right to privacy, it is pertinent to determine the extent of this right as it relates to a cause of action given to one whose details of his personal life have been allegedly wrongfully disclosed. This aspect of the right to privacy has been described as the right to repress publication of those facts which "concern the private life, habits, acts and relations of an individual . . ." Warren and Brandeis, 4 Harv. L. Rev. at 216 quoted in *Sidis* v. *F-R Pub. Corp.*, 113 F. 2d 806, 809 (2d Cir. 1940). See also *Cason* v. *Basken*, 20 So. 2d 243, 249 (Fla. 1945).

In this light the insubstantiality of petitioner's assertion immediately is evident. It cannot be plausibly contended that the information required of the motor vehicle registrant touches the individual's private life or habits.

Vehicle & Traffic Law § 401(2) provides that the Commissioner shall register the motor vehicle with the name, residence and business address of the owner. Moreover, these non-intimate facts are to be entered into a book and "the information in such record may be obtained upon payment of the fees specified in § 202 of this chapter". Thus these facts are clearly public records and have so been judicially determined. *Page* v. *Harnett*, 130 Misc. 239 (Sup. Ct. Albany Co. 1927).* Nor does the petitioner contend otherwise. Indeed, no assertion can be found in petitioner's complaint in the District Court that the information required of a motor vehicle registrant infringes one's right to privacy. His claim simply involve his objection to the receipt of unwelcome mail which he presumes stems from the list of motor registrants supplied to Polk & Co. as high bidder. It therefore is inconceivable how such admittedly non-intimate information which clearly violates no ordinary sense of decency and which is openly available to public inspection and scrutiny suddenly, in the mind of the petitioner, ripens into an invasion of privacy upon the sale of such public information to a private firm in accordance with Vehicle & Traffic Law § 202(3).

Finally, although for the purposes of the discussion we have relied upon the tort law concept of invasion of privacy, the historic basis of this "right", the petitioner has utterly failed to produce one single case that has considered the actionable tort of wrongful publicity given to an individual's private life as one rising to constitutional dimensions. The conclusion is inescapable that petitioner's attack upon Vehicle & Traffic Law § 202(3) is wholly without merit and perforce insubstantial.

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* See also Public Officers Law § 66; *Matter of Werfel* v. *Fitzgerald*, 23 A. D. 2d 306 (2d Dept. 1965). For other examples of public record statutes see N. Y. Real Property Tax Law §§ 506, 516, 1406, 1410; N. Y. Election Law § 34.

(b)

Right to Privacy: Intrusion Upon an Individual's Solitude or Seclusion.

We now turn to petitioner's contention that the use made by Polk & Co. of the registration list purchased by it from the Commissioner resulted in a large volume of advertising and crank mail to the annoyance of petitioner and in violation of his right to privacy. Leaving aside the fact that petitioner has critically not alleged in his complaint that he was the recipient of crank mail traceable to Polk & Company's list obtained from the Commissioner, it is clear that his allegation with respect to the use made by Polk & Company of the list fails to present a substantial constitutional question, requiring the convening of a three-judge court.

First, it is elementary that an attack upon the alleged unconstitutional application of an otherwise constitutional statute is not a ground for constituting the statutory court. *Phillips* v. *United States,* 312 U. S. 246 (1941); *Ex Parte Bransford,* 210 U. S. 354 (1940). Yet the use by Polk & Co. of the list obtained in accordance with the statute here is precisely what petitioner seeks to restrain.

Second, although this Court has recognized, in a few instances, that the actionable tort of "intrusion" unlike that of public divulgence to the public of one's private history (*supra,* pp. 5-6), may be constitutionally protected, the area of petitioner's privacy allegedly intruded upon (his mail box) is far and away outside the pale of constitutionally required protection. This observation is buttressed by a simple analysis of petitioner's citations put forward by him in support of his claim of substantiality.

Petitioner, in his brief here, seeks first to equate the alleged intrusion upon his mail box with search and seizure cases. The irrelevancy of these cases is handily disposed

of by Judge Learned Hand's observation in *United States* v. *Poller,* 43 F. 2d 911 (2d Cir. 1930), that

> "... it is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his efforts to secure evidence against him."

The decision in *Berger* v. *New York,* 388 U. S. 41 (1967), cited by the petitioner here as well as *Camara* v. *Municipal Court,* 387 U. S. 523 (1967) and *See* v. *City of Seattle,* 387 U.S. 541 (1967), were simply further recognitions flowing from *Mapp* v. *Ohio,* 367 U. S. 643 (1961), that "the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth" Amendment *id.* at 655. But we have no quarrel with such proposition; we do, however, fail to see how search and seizure cases aid petitioner's cause.

Petitioner's citation of *Breard* v. *Alexandria,* 341 U. S. 622 (1951), is clearly of no aid to him. Although this Court there countenanced the state's power to limit door-to-door intrusions where the salesman corners "the quarry in his home and through his open door put[s] pressure on the prospect to purchase" (*id.* at 627), it specifically stated that "The usual methods of solicitation—radio, periodicals, *mail,* local agencies—are open" *id. at* 632 (emphasis supplied).

Similarly, *Public Utilities Commission* v. *Pollack,* 343 U. S. 451 (1952), a case involving radio broadcasting on public conveyances in the District of Columbia, does not further petitioner's cause. The appellant argues that two principles enunciated in that decision favor him: (a) this Court considered Pollack sufficiently important to warrant consideration by that Court and (b) the decision upholds the right to one's complete privacy in his home.

With respect to the first principle it should be noted that the federal Public Utilities Commission in *Pollack* specifically issued an order concluding that radio programming in public vehicles was neither an obstacle to safety of the operator nor would it improve the conditions under which the public rides. The Court, on the basis of this federal agency's approval, critically found "a sufficiently close relation between the Federal Government and the radio service to make it necessary . . . to consider those Amendments [claims of violation of First and Fifth Amendment rights]" *id.* at 462. But here the Commissioner of Motor Vehicles pursuant to the statute under attack simply sold a list of motor vehicle registrants to Polk & Co. Unlike the *Pollack* case neither the state statute nor the State Commissioner approved or disapproved what Polk & Co. did thereafter with its list.* Thus there is clearly no showing here of a sufficient government action to examine the applicability of the Fourteenth Amendment to the facts here. See *Public Utilities Commission* v. *Pollack, supra* at 463.

With respect to petitioner's reliance upon the statement in *Pollack* concerning the "complete right of privacy" in one's home, *id.* at 464, it is apparent from the tort law principles of right to privacy against intrusion which have, as noted above, sometimes been blessed by constitutional protection, that no such right has ever been intended to extend to the mail box. What is meant by the right of privacy in one's home was described by Mr. Justice Douglas' dissent in *Pollack*:

> "It gives the guarantee that a man's home is his castle beyond invasion either by inquisitive or by officious people." *Id.* at 467.

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* To be sure, petitioner, as observed above, does not even allege that the "crank" mail it received was traceable to Polk & Co. or to the Motor Vehicle lists purchased by that company.

The alleged noxious advertising resting in petitioner's mail box cannot be seriously said to infringe the guarantee that a man's home is his castle.

Finally, petitioner points to the recent decision of the Supreme Court in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). To argue that the sanctity of the marital bedroom is co-extensive with an alleged sanctity of the mail box demonstrates far beyond what we can possibly say here the insubstantiality of petitioner's assertions.

In essence, petitioner's complaint is not with the statute or any of the parties before this Court. His complaint is perhaps with the cheap bulk mail rates. We are all victims at some time of large volumes of advertising and junk mail, oftentimes emanating from local retailers and others hardly attributable to New York Vehicle & Traffic Law § 202(3).

(3)

Petitioner suggests that this case poses an additional issue never decided by this Court—whether a state has a right to grant a particular business concern a monopoly of communication with a large sector of the public. This contention is totally irrelevant to petitioner's claims in the Court below and furthermore is not consistent with the facts. As pointed out in the argument to the Circuit Court of Appeals, petitioner's "right to privacy" claim would be the same whether these records were available to 1 or 20 or 30 or more companies engaged in the same type of business. Further, there is nothing in the statute to prevent others from obtaining copies of filed registrations and finally, the contract between the Commissioner and Polk & Co. provides that Polk & Co. must sell upon request copies of the raw lists furnished by the State to any corporation, firm, partnership or individual at the prevailing rate that has been charged to others by Polk & Co. and that said rate shall be, in any event, no more than pro-

vided for in § 202(3) of the Vehicle & Traffic Law of the State of New York.

Petitioner's claim therefore that this statute is unconstitutional is wholly insubstantial and his complaint was properly dismissed.

CONCLUSION

The petition for certiorari should be denied.

Dated: New York, N. Y., April 26, 1968.

Respectfully submitted,

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